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NO.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54 and FRANK GERACE, PRESIDENT HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54,

Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

JURISDICTIONAL STATEMENT

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Dated: September, 1983

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Question Presented

Whether the State of New Jersey, as part of a larger regulatory scheme whose purpose is to strictly and effectively control its sensitive and vulnerable casino industry, can require, consistent with federal labor policy, the registration of only those labor unions representing employees of operating casino hotels in Atlantic City and the removal from office in those specific unions of certain individuals who, after a formal hearing, are found disqualified by reason of certain statutorily-proscribed conduct, including enumerated criminal convictions and involvement with organized crime, which conduct would not necessarily disqualify union officials under federal labor law.*

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* The parties to the proceeding in the United States Court of Appeals for the Third Circuit were: Martin Danziger, Acting Chairman; Donald Thomas, Commissioner; Madeline McWhinney, Commissioner; Carl Zeitz, Commissioner, constituting the Casino Control Commission, State of New Jersey; G. Michael Brown, Director, Department of Law Public Safety, Division of Gaming Enforcement, State of New Jersey; Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey and Thomas Kean, Governor, State of New Jersey, Appellants herein; and Hotel and Restaurant Employees and Bartenders International Union Local 54 and Frank Gerace, President, Hotel and Restaurant Employees and Bartenders International Union Local 54, Appellees herein. The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 331, were intervenors in the proceeding before the United States District Court for the District of New Jersey, but did not participate in the proceeding before the Third Circuit.

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IN THE

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G. MICHAEL BROWN, DIRECTOR DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY; DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY and THOMAS KEAN, GOVERNOR, STATE OF NEW JERSEY,

Appellants,

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On Appeal from the United States Court of Appeals for the Third Circuit

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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 709 F. 2d 815 (3d Cir. 1983), and appears in the appendix hereto at App. A, 1a-77a.* The opinion of the United States District Court for the District of New Jersey is reported at 536 F. Supp. 317 (D.N.J. 1982), and appears in the appendix hereto at App. B, 78a-128a.

The opinions of the New Jersey Casino Control Commission are not reported. They are reprinted in the appendix hereto at App. D, 131a-205a, and App. F, 208a-216a.

Jurisdiction

This is an action for declaratory, injunctive, and monetary relief, brought under 28 U.S.C. §§1331, 1337 and 1343 (1976 & Supp. V 1981), in which the District Court refused to preliminarily enjoin the enforcement of a portion of New Jersey's Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984) (App. B, 78a-122a).

On June 6, 1983 the Third Circuit reversed, holding that this statute was preempted by federal labor law, and was therefore invalid under the Supremacy Clause of the Constitution (App. A, 1a-37a; App. G, 217a-219a). A timely petition for rehearing or rehearing en banc was denied on June 30, 1983 (App. H, 220a-222a). A notice of appeal to

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* References to the Appendix, which is separately bound and which is filed jointly on behalf of all Appellants herein, are given in the following form: Each separate item is designated with a different letter, the pages of the entire Appendix being numbered consecutively throughout. Thus, page 1 of the Appendix is referred to as "App. A, 1a," etc.

this Court was duly filed in the Third Circuit on July 20, 1983 (App. I, 224a-229a).

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court to review the decision of the Third Circuit on appeal is conferred by 28 U.S.C. §1254(2) (1976). The following cases sustain the Court's jurisdiction to review the judgment on appeal in this case: *Belknap, Inc.* v. *Hale,* 103 S. Ct. 3172, 3176 n. 5 (1983); *City of New Orleans* v. *Dukes,* 427 U.S. 297, 301-303 (1976); *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 476-487 (1975); *Construction Laborers* v. *Curry,* 371 U.S. 542, 548-552 (1963).

Constitutional and Statutory Provisions Involved

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The National Labor Relations Act, §7, 29 U.S.C. §157 (1976), provides in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

This section is reprinted in full in the appendix hereto at App. J, 235a.

The Labor-Management Reporting and Disclosure Act of 1959, §504, 29 U.S.C. §504 (1976), provides in relevant part:

> No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, exortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of subchapter III or IV of this chapter, or conspiracy to commit any such crimes, shall serve—
>
> > (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . .
>
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment . . .

This section is reprinted in full in the appendix hereto at App. K, 236a-237a.

The Employee Retirement Income Security Act of 1974, §411, 29 U.S.C. §1111 (1976), provides in relevant part:

> No person who has been convicted of, or has been imprisoned as a result of his conviction of, robbery, bribery, exortion, embezzlement, fraud, grand lar-

> ceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnaping, perjury, assault with intent to kill, any crime described in section 80a-9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element, shall serve or be permitted to serve—
>
> (1) as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, or employee of any employee benefit plan, or
>
> (2) as a consultant to any employee benefit plan,
>
> during or for five years after such conviction or after the end of such imprisonment, whichever is the later . . .

This section is reprinted in full in the appendix hereto at Ap L, 238a-240a.

The Employee Retirement Income Security Act of 1974, §514, 29 U.S.C. §1144 (1976), *as amended by* Act of Jan. 14, 1983, Pub. L. No. 97-473, §§301(a), 302(b), 96 Stat. 2611, 2613 (1983), provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter

> relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

This section is reprinted in full in the appendix hereto at App. M, 241a-245a.

Section 93 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), provides in relevant part:

> a. Each labor organization, union or affiliate seeking to represent employees licensed or registered under this act and employed by a casino hotel or a casino licensee shall register with the commission annually . . .
>
> b. No labor organization, union or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed or registered under this act may receive any dues from any employee licensed or registered under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union or affiliate is disqualified in accordance with the criteria contained in section 86 of this act. The commission may for the purposes of this subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require. . . .

This section is reprinted in full in the appendix hereto at App. N, 246a-247a.

Section 86 of the New Jersey Casino Control Act, N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984) is reprinted in full in the appendix hereto at App. O, 248a-255a.

Statement of the Case

By referendum held in 1976, the electorate of New Jersey amended their constitution to permit the legislative authorization of casino gambling, geographically limited to Atlantic City, in an effort to revitalize that decaying resort area as well as to increase revenues devoted exclusively to the State's elderly and handicapped residents. N.J. Const. (1947) art. 4, §7, ¶2(D) (West Supp. 1983-1984); *Knight* v. *City of Margate,* 86 N.J. 374, 380, 431 A. 2d 833, 836 (1981).

A unique industry, casino gambling has had a checkered history in this country, particularly in Nevada, where organized crime infiltrated and dominated the industry's early development. *The Development of the Law of Gambling; 1776-1976* at 437-467 (U.S. Dept. of Justice, 1977); *Marshall* v. *Sawyer,* 301 F. 2d 639, 648-654 (9th Cir. 1962) (Pope, J., concurring); *Nevada Tax Comm'n* v. *Hicks,* 73 Nev. 115, 310 P. 2d 852, 854 (1957). The cash nature of the business—that is, the enormous amount of money that flows daily through a casino operation and the large number of unrecorded transactions associated therewith—make the industry an extremely attractive and vulnerable target for organized criminal elements, who may use the proceeds obtained from gambling to finance illegal activities, infiltrate legitimate buinesses, and corrupt and subvert our democratic processes. *See Development, supra,* at 453-459; *United States* v. *Garrison,* 348 F. Supp. 1112, 1119 (E.D. La. 1972); Organized Crime Control Act of 1970, Statement of Findings and Purpose, *reprinted following* 18 U.S.C. §1961 (1976); (App. A, 64a-66a). Fully aware of this background, the public approved the legalization of gaming only after repeated assurances that New Jersey would have the strongest regulation of casinos in the world, that organized crime would be prevented from infiltrating the industry in any manner, and that only those individ-

uals of the highest character and integrity would be permitted to participate in casino operations (App. A, 66a).

Charged with the responsibility for implementing the constitutional mandate, the New Jersey Legislature had before it many studies regarding the possibilities for crime and corruption associated with the institution of this industry. *E.g. Second Interim Report of Governor's Staff Policy Group on Casino Gambling* (Feb. 17, 1977); *Report and Recommendations on Casino Gambling by the New Jersey State Commission of Investigation* (April 1977). Responding to these dangers, and to foster public confidence and trust in its system of controls, the Legislature enacted the New Jersey Casino Control Act, a comprehensive licensing scheme "designed to extend strict State regulation to all persons, locations, practices and associations related to the operation of licensed casino enterprises and all related service industries." N.J. Stat. Ann. §5:12-1(b)(6) (West Supp. 1983-1984). *See Knight* v. *City of Margate, supra,* 86 N.J. at 380-382, 431 A. 2d at 837.

To enforce this scheme, the Legislature created two separate and distinct State agencies: the Division of Gaming Enforcement ("Division"), a branch of the New Jersey Attorney General's Office, and the New Jersey Casino Control Commission ("Commission"), an independent *quasi*-judicial administrative body. Together, these agencies have the power and duty to investigate, license, supervise and pervasively control legalized gambling in all its aspects. N.J. Stat. Ann. §§50, 76, 80-95 (West Supp. 1983-1984).

With respect to the labor unions which might become involved in gaming, the Legislature was made aware of reports that such employee organizations had been a source of corruption in other jurisdictions. *Second Interim Report, supra,* at 46. In more specific terms, the State Commission of Investigation observed that there exist

> few better vehicles utilized by organized crime to gain a stranglehold on an entire industry than labor racketeering. Organized crime control of certain unions often requires the legitimate businessmen who employ the services of the union members to pay extra homage to the representatives of the underworld. Moreover the ready source of cash which union coffers provide can be employed as financing of all sorts of legitimate or illicit ventures. [*Report and Recommendations, supra,* at 1-H].

To dampen the potentially explosive combination of labor racketeering and gambling, proposals were made that any labor organization representing casino employees should be required to register with the Casino Control Commission. Further, and only as a consequence of having engaged in certain statutorily proscribed conduct, the leadership of such organizations would be required to forfeit their offices or, having failed or refused to do so, their union would be barred from receiving dues or administering employee benefit plans.* *Report and Recommendations, supra,* at 1H-2H.

Heeding these warnings and recommendations, the Legislature enacted N.J. Stat. Ann. §5:12-93 (West Supp. 1983-1984), which provides for the registration of labor organizations representing employees engaged in the casino industry, and which disqualifies from continuing to hold office those union representatives found to have en-

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* The provisions suggested were patterned after those embodied in the New Jersey Waterfront Commission Act, N.J. Stat. Ann. §§32:23-80, 80.2 (West 1963), which was enacted as part of a bi-state compact with New York in order to attack the problems of crime and corruption on the States' mutual waterfront. *See generally DeVeau* v. *Braisted,* 363 U.S. 144 (1960), discussed *infra.*

gaged in specifically delineated conduct prohibited by state law. In the event such a disqualified union official remains in office, the statute further mandates that the labor organization may not "receive any dues from any employee licensed or registered under [the Casino Control Act] and employed by a casino licensee or its agent, or administer any pension or welfare funds." N.J. Stat. Ann. §5:12-93(b) (App. N, 247a). Among the disqualifying conduct set forth in the statute, incorporating by reference N.J. Stat. Ann. §5:12-86 (West Supp. 1983-1984), are an individual's conviction for any of a series of enumerated crimes, and one's membership in, or operation as a strawman for, organized crime (App. O, 248a-253a, 254a).

In accordance with these statutory provisions, Hotel and Restaurant Employees and Bartenders International Union Local 54 ("Local 54"), an NLRB-certified labor union representing State-licensed employees in the New Jersey casino industry, registered with the Commission as did its president, Frank Gerace, and other officers, agents and principal employees. Thereafter, and as the result of its independent investigation, the Division filed reports with the Commission indicating possible grounds for disqualification of various union officers and agents based upon their criminal convictions and/or organized crime associations. A hearing before the Commission to consider the Division's allegations was scheduled to commence in September 1981.

On August 17, 1981, Local 54 and Gerace as plaintiffs filed in the United States District Court for the District of New Jersey a complaint for declaratory, injunctive, and monetary relief, together with a motion for a preliminary injunction. In support of their claims, the plaintiffs urged that the operation of N.J. Stat. Ann.

§5:12-93 was preempted by federal labor law, and that they would be irreparably harmed if the Commission hearing were permitted to proceed as then scheduled. Faced with the possible issuance of a temporary restraining order, the Commission agreed to defer its administrative hearing pending the District Court's ruling on the preliminary injunction issue.

On March 22, 1982, the District Court issued a ruling denying the plaintiff's motion for a preliminary injunction. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danzinger,* 536 F. Supp. 317 (D.N.J. 1982) (App. B, 78a-122a). While appeals of this ruling were pending in the Third Circuit, and because no preliminary injunction or injunction pending appeal had been granted, the Commission commenced its hearing on June 8, 1982. That proceeding, in which both Local 54 and Gerace fully participated, focused on the matters raised in the Division reports and concluded on September 13, 1982.

After reviewing the testimony of the witnesses and the documents entered into evidence, the Commission issued a final decision, dated September 28, 1982, declaring that certain union officers and agents—including Frank Gerace, the organization's president—were disqualified within the terms of N.J. Stat. Ann. §5:12-86 because of their criminal records and/or organized crime associations (App. D, 131a-197a). Accordingly, the Commission issued an order pursuant to N.J. Stat. Ann. §5:12-93 providing in substance that if any of the disqualified individuals remained as an officer, agent or principal employee of Local 54 as of October 12, 1982, the union would thereafter be prohibited from collecting dues from any employee licensed or registered under the Casino Control Act and

employed by a casino licensee or its agent.* (App. E, 206a-207a). Enforcement of this order was enjoined by the District Court, awaiting resolution of the already-pending appeals (App. C, 129a-130a).

All parties subsequently filed with the Third Circuit a joint motion to supplement the record on appeal with the decisions and order of the Commission, which motion was granted. On June 6, 1983, the Court of Appeals issued its 2-1 decision in this matter. *Hotel and Restaurant Employees and Bartenders International Union Local 54* v. *Danziger,* 709 F. 2d 815 (3d Cir. 1983) (App. A, 1a-77a).

The Third Circuit majority held in essence that the disqualification standards for union representatives and the dues collection ban established by N.J. Stat. Ann. §5:12-93 were both preempted by Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. §157 (1976), and that the prohibition on the administration of pension or welfare funds was preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), §411, 29 U.S.C. §1111 (1976). The order appealed from was therefore reversed, and the case remanded to the District Court for the entry of an order enjoining the Commission and Division from taking any further action to enforce any part of N.J. Stat. Ann. §5:12-93 (App. A, 16a-37a).

In an opinion dissenting in part, Judge Becker agreed with the majority that ERISA precluded the Commission

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* On October 12, 1982, the Commission issued a supplemental opinion which concluded that the additional sanction available to it under N.J. Stat. Ann. §5:12-93, *i.e.* the prohibition on the administration of pension or welfare funds, would not be applied to Local 54 based on the record presented in this case (App. F, 208a-215a).

from regulating the management of welfare and pension funds. He disagreed, however, that the remainder of N.J. Stat. Ann. §5:12-93 was precluded, stating in part:

> It is indisputable that New Jersey's interest in comprehensive regulation of casino gambling is "deeply-rooted in local feeling and responsibility," . . . and that the restrictions on persons who may be associated with the industry—in whatever capacity—are of manifest importance to the State "as a protection to its citizens," . . . And while I acknowledge that invocation of the sanctions provided by section 93 of the Casino Control Act may curtail the full exercise of section 7 rights, given the unique dangers posed by criminal infiltration of casino gambling, I cannot say that New Jersey's interest is outweighed by "any harm to the regulatory scheme established by Congress." Rather, Congress' acquiescence in the legislation at issue in De Veau [v. *Braisted*, discussed *infra*] suggests a congressional perception that, in situations where the threat to the welfare to the state is so pervasive and so well-documented that the need for comprehensive state regulation is manifest, such regulation will be permissible even if it includes a component that directly restricts section 7 rights. I believe such situations to be rare, but I also believe that one is presented here [App. A, 72a-73a (citations and footnote omitted)].

A timely petition for rehearing or rehearing en banc was filed with the Third Circuit, which denied the petition by an evenly-divided vote of 5-5. (App. H, 220a-222a). In a separate statement on the rehearing petition, Judge Adams, who voted against rehearing, expressed his view that

> [t]his appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments. . . .
>
> Because this appeal raises a question central to the concept of federalism, it would appear most appropriate, at least to me, that it be addressed at the first opportunity by the Supreme Court, so that all federal courts would have the benefit of guidance by the nation's highest tribunal on this crucial topic. Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the National Labor Relations Act preempts a provision such as section 93 of the Casino Control Act would seem a question worthy of full exploration by the Supreme Court. [App. H, 222a-223a].

The instant appeal to this Court followed.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The holding below, that New Jersey is preempted from prescribing strict standards of conduct for officials of labor unions engaged in its unique, localized casino industry, undermines priniciples of federalism and is inconsistent with prior decisions of this Court.

This case presents a pure question of law, *i.e.* whether N.J. Stat. Ann. §5:12-93—an anti-corruption measure which establishes certain standards of conduct for officials of labor unions representing State-licensed casino hotel employees in Atlantic City, New Jersey—is inexorably preempted by federal labor law.* As a result of the decision below enjoining enforcement of this key provision on preemption grounds, the ability of State regulatory agencies to ensure the integrity of New Jersey's casino gaming industry has been seriously undermined, and a historically documented avenue of organized criminal access into gaming has been wrested from State control. The question merits full briefing and plenary review because of its novelty, its obvious significance with regard to State law enforcement efforts, and its far-ranging implications for principles of federalism in the labor field.

The doctrine for determining whether State regulation is preempted by the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1976), is well settled in this Court. If the conduct at issue is arguably prohibited or protected

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* Although the findings of the Commission in this particular case have been presented to the Court by way of background information, see App. D, 131a-197a; App. F, 208a-215a, the Third Circuit held New Jersey's statute to be preempted on its face (App. A, 37a), thus the issue before this Court is wholly independent of the manner in which the challenged statute was applied to the facts below.

by the Act, otherwise applicable State law and procedures are ordinarily preempted.* *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). Nevertheless, State regulation may still be sustained if the behavior to be regulated is of only peripheral concern to the federal law or touches interests deeply rooted in the local feeling and responsibility. *Belknap, Inc.* v. *Hale, supra*, 103 S. Ct. at 3176-3177. The question of whether State regulation should be allowed because of the deeply-rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme estabilshed by Congress against the importance of the asserted action to the State as a protection to its citizens. *Local 926* v. *Jones*, 103 S. Ct. 1453, 1459 (1983).

With respect to Section 7 of the NLRA, 29 U.S.C. §157 (1976) (App. J, 235a), which in part guarantees workers the right "to bargain collectively through representatives of their own choosing," this Court held in *Hill* v. *Florida*, 325 U.S. 538 (1945), that a State was preempted under that provision from enforcing a law—applicable to all unions operating within the jurisdiction—which purported to establish broad qualification standards including "good moral character" for officials of such unions. Subsequent to *Hill*, however, both Congress and this Court have clearly demonstrated that the freedom of a group of employees to designate "representatives of their own choosing" is necessarily and obviously less than complete. Thus, reacting to

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* The NLRA has also been held to preempt State law relating to conduct that is neither protected nor prohibited, where it is determined that Congress intended the conduct to be unregulated and left to the free play of economic forces. *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). This branch of the preemption doctrine is not at issue in the present case. Compare *Belknap, Inc.* v. *Hale, supra*, 103 S. Ct. at 3177-3181.

the disclosures of the McClellan Committee regarding racketeering, crime, and corruption in the labor movement, see H.R. Rep. No. 741, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2424, 2431, Congress itself established criteria disqualifying certain persons from holding union office as part of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §504(a) (1976) (App. K, 236a-237a), and before that, acquiesced in state-imposed restrictions on that federal interest which were upheld in *DeVeau* v. *Braisted,* 363 U.S. 144 (1960).

DeVeau involved a challenge to §8 of the New York Waterfront Commission Act, which established qualification standards for officials of waterfront unions more stringent than those applicable under federal law, and which prohibited the collection of dues by any union whose officers or agents were disqualified under the enumerated criteria. This statute had been enacted in furtherance of a Congressionally-approved bi-state compact between New York and New Jersey, designed to attack the problems of crime and corruption which had theretofore plagued the States' common waterfront. 363 U.S. at 144-151.

Relying upon the NLRA and *Hill* v. *Florida,* the appellant in *DeVeau* first argued that New York was preempted from impinging to any extent on the waterfront employees' freedom of choice in the selection of their representatives. 363 U.S. at 151-152. In an opinion for the four-Justice plurality,* however, Justice Frankfurter rejected any such absolutist approach:

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* Justice Brennan, the only remaining Justice who sat on the *DeVeau* Court, did not join in the plurality opinion, but instead authored a brief opinion concurring in the result. 363 U.S. at 160-161.

> It would misconceive the constitutional doctrine of pre-emption—of the exclusion because of federal regulation of what otherwise is conceded state power —to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light that Congress has shed for our guidance. The relevant question is whether we may fairly infer a congressional purpose incompatible with the very narrow and historically explained restrictions upon the choice of a bargaining representative embodied in §8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration, however dialectically plausible, of that policy? [363 U.S. at 153].

Declining to find in Section 7 a congressional purpose to preclude the states from regulating at all—the NLRA "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing,'" 363 U.S. at 152—the Court then examined the compatibility of the federal-state effort, concluding:

> This is not a situation where the operation of a state statute so obviously contradicts a federal enactment that it would preclude both from functioning together or, at least, would impede the effectiveness of the federal measure. Section 8 of the Waterfront Commission Act does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received "good conduct" certificates. The fact that

> there is some restriction due to the operation of state law does not settle the issue of pre-emption. The doctrine of pre-emption does not present a problem in physics but one of *adjustment* because of the interpendence of federal and state interests and of the interaction of federal and state powers. [363 U.S. at 152 (emphasis added)].

In the process of adjustment, the Court reconciled New York's intrusion on the federal right with its legitimate and compelling interest in combating local crime infesting the bi-state waterfront industry. 363 U.S. at 155. The Court concluded that this interest, reflected in the narrow and historically explained restrictions upon the choice of a bargaining representative embodied in Section 8 of the New York Waterfront Commission Act, neither frustrated nor contradicted the federal congressional purpose expressed in Section 7 of the NLRA. 363 U.S. at 154-155.

Similarly, as regards the appellant's second preemption argument, that §8 was impliedly barred to the extent that its disqualification provisions were at variance with those contained within §504(a) of the LMRDA, the Court was no more receptive, stating:

> The fact that Congress itself has thus imposed the same type of restriction upon employees' freedom to choose bargaining representatives as New York seeks to impose through §8, namely, disqualification of ex-felons for union office, is surely evidence that Congress does not view such a restriction as incompatible with its labor policies. [363 U.S. at 156].

This circumstance, together with the absence of any preemptive language in §504(a) and the express disclaimer of

preemption found in §603(a), were all held to conclusively refute the notion that §8 of the Waterfront Act was preempted by the LMRDA. 363 U.S. at 156-157.

Here, the Third Circuit majority, in striking down Section 93's disqualification standards and dues collection prohibition, erroneously applied the type of NLRA/LMRDA absolutist preemption approach rejected in *DeVeau*, and mistakenly eschewed the careful weighing of federal and State interests mandated by *DeVeau* and other decisions of this Court as recent as *Belknap, Inc.* v. *Hale* and *Local 926* v. *Jones, supra.* To have invalidated those portions of §93 even after a careful, balanced consideration of the dual interests at stake would, we submit, have been error given the weighty and overriding concern of New Jersey in enacting a comprehensive regulatory scheme which seeks, among other things, to minimize the risk that organized crime would use labor unions as an entree into its fledgling casino gaming industry. But to have done so in utter disregard of the latter, disrupting legitimate state pursuits in the process, grossly betrays the most fundamental of preemption precepts governing the proper analysis of concurrent federal-state exercises of authority.

Preemption of the pension or welfare fund administration ban of N.J. Stat. Ann. §5:12-93 presents a closer question because of the existence of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* (1976). Although ERISA, like the LMRDA, contains standards for the disqualification of fund administrators, 29 U.S.C. §1111 (1976) (App. L, 238a-240a), ERISA—unlike the LMRDA—also contains express language preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," 29 U.S.C. §1144 (1976) (App. M, 241a). This lan-

guage has heretofore been accorded an expansive interpretation by this Court. See *Shaw* v. *Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

It is the position of the appellants that New Jersey's Casino Control Act does not "relate to" employee benefit plans in the manner contemplated by ERISA, but instead exists solely as a device to coerce the removal of disqualified officials from casino unions, and that the state disqualification standards should be considered as being supplemental to, rather than contradictory of, the federal criteria. Viewed in such a manner, N.J. Stat. Ann. §5:12-93 may pass muster using the same reasoning employed in *DeVeau*. See *Internat'l Longshoremen's Assn.* v. *Waterfront Comm'n*, 495 F. Supp. 1101, 1124-1125 (S.D. N.Y. 1980), *aff'd in part and rev'd in part on other gds.*, 642 F. 2d 666 (2d Cir.), *cert. den.*, 454 U.S. 966 (1981); *Local 1804* v. *Waterfront Comm'n*, 85 N.J. 606, 615-617, 428 A. 2d 1283, 1288-1289 (1981). Regardless of the merits, however, such an ERISA preemption issue has not previously been considered by this Court in the context presented by the instant case.

2. The holding below, that N.J. Stat. Ann. §5:12-93 is preempted in its entirety, is inconsistent with prior decisions of this Court.

N.J. Stat. Ann. §5:12-93 relies for its enforcement on five distinct steps in the regulation of casino unions: (1) registration of the union and its officials; (2) an investigation and report by the Division; (3) a hearing before the Commission; (4) a decision by the Commission on the the qualifications of union officials; and (5) the imposition by the Commission of sanctions upon the union to coerce

the removal of any officials found to be disqualified. In holding the statute preempted in its entirety, the Third Circuit majority failed to consider the possible preemption of each step as a separate issue, and reached a result seemingly at odds with the main decision upon which the majority purported to rely.

It is true that in *Hill* v. *Florida, supra,* this Court held a State's across-the-board union licensing statute to be preempted. Nevertheless, the Court was careful to point out in its opinion:

> The requirement as to the filing of information and the payment of a $1.00 annual fee does not, in and of itself, conflict with the Federal Act. But for failure to comply, this union has been enjoined from functioning as a labor union. It could not without violating the injunction and also subjecting itself to the possibility of criminal punishment even attempt to bargain to settle a controversy or a strike. It is the sanction here imposed, and not the duty to report, which brings about a situation inconsistent with the federally protected process of collective bargaining. [325 U.S. at 543].

Accord, Alabama State Federation of Labor v. *McAdory,* 325 U.S. 450 (1945).

It may be in the present case that New Jersey is preempted from removing disqualified officials from casino labor unions, or from imposing sanctions upon unions designed to coerce such removal. It does not necessarily follow, however, that the State is similarly preempted from continuing to register unions, to investigate them, and to hold fact finding hearings about them, for whatever advantage such proceedings might provide the State in its overall regulation of this sensitive industry. Without re-

gard the ultimate conclusion on the preemption issue, this question itself appears worthy of fuller exploration and review.

3. The holding below satisfies any finality requirement that may exist under 28 U.S.C. §1254(2) (1976).

Although this Court has left open the question whether there exists a "finality" requirement in the context of an appeal brought pursuant to 28 U.S.C. §1254(2) (1976), *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 301-302, the judgment of the Court of Appeals in this case satisfies the tests of "finality" developed by the Court in prior decisions. First, the Third Circuit finally disposed of the federal preemption issue, *Belknap, Inc.* v. *Hale, supra,* 103 S. Ct. at 3176 n. 5, leaving no action of substance for the District Court but the mechanical entry of a judgment permanently enjoining New Jersey from enforcing its law, *Construction Laborers* v. *Curry, supra,* 371 U.S. at 551. Second, the preemption issue decided by the Third Circuit will survive and require decision regardless of the outcome of further District Court proceedings.* *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 480. Finally, if the Third Circuit was incorrect in invalidating N.J. Stat. Ann. §5:12-93, any delay in securing reversal of that decision irretrievably erodes New Jersey's ability to regulate its casino gaming industry by precluding, as a practical matter, the

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* Such proceedings will include determination of the plaintiffs' monetary damage claims. Although the plaintiffs have also advanced additional constitutional challenges to the New Jersey Casino Control Act on its face and as applied, such questions appear moot unless this Court reverses the Third Circuit's preemption decision (*See* App. A, 37a).

State's ability to expeditiously register and investigate the credentials of all unions who operate or seek to operate within that industry. This injury appears at least as serious as the "continued disruption of the city's internal economic affairs" relied upon by the Court to support appellate jurisdiction in *City of New Orleans* v. *Dukes, supra,* 427 U.S. at 302. *See also Belknap, Inc.* v. *Hale, supra,* 103 S. Ct. at 3176 n. 5; *Cox Broadcasting Corp.* v. *Cohn, supra,* 420 U.S. at 483-485; *Construction Laborers* v. *Curry, supra,* 371 U.S. at 550.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

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